

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3
4 UNITED STATES OF AMERICA,)
5)
6 vs.) No. 1:09-cr-10382-DPW-1
7)
8 ALBERT GONZALEZ,)
9 Defendant.)

10 BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK
11

12 PLEA AND MOTION HEARING
13

14
15 John Joseph Moakley United States Courthouse
16 Courtroom No. 1
17 One Courthouse Way
18 Boston, MA 02210
19 Tuesday, December 29, 2009
20 2:05 p.m.

21 Brenda K. Hancock, RMR, CRR
22 Official Court Reporter
23 John Joseph Moakley United States Courthouse
24 One Courthouse Way
25 Boston, MA 02210
(617)439-3214

1 APPEARANCES:

2 UNITED STATES ATTORNEY'S OFFICE
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4 DONALD L. CABELL, AUSA
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7 On behalf of the United States of America

8
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10 By: MARTIN G. WEINBERG, ESQ.
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13 On behalf of the Defendant.

14
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16 By: MICHAEL D. RICCIUTI, ESQ.
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20 On behalf of Interested Party Company A
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1 (The following proceedings were held in open court
2 before the Honorable Douglas P. Woodlock, United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on
6 Tuesday, December 29, 2009):

7 THE CLERK: All rise.

8 (The Honorable Court entered the courtroom at 2:05 p.m.)

9 THE CLERK: You may be seated. This is the matter of
10 the United States versus Albert Gonzalez, Criminal Action
11 09-10382.

12 THE COURT: Well, the principal purpose, obviously, is
13 to conduct a Rule 11 hearing, but there are a couple of
14 ancillary matters that have arisen.

15 One, I am made aware of some sort of
16 diminished-capacity claim that is being made, I guess, in
17 mitigation of sentencing.

18 But, Mr. Weinberg, does it, in any event, affect his
19 ability to plead here?

20 MR. WEINBERG: It does not, your Honor. There is no
21 relationship between the sentencing defense and the 5K2.13
22 position that was presented to Judge Saris and Mr. Gonzalez's
23 rationality, his understanding, his capacity to communicate
24 with counsel and a voluntary and intelligent plea to these
25 charges, your Honor.

1 THE COURT: All right. The second is, that I have
2 received a modification of the plea agreement here in respect
3 of the Waiver of Appeal and Collateral Attack. While it has
4 been my experience that waivers of appeal and waivers of
5 collateral attack are not generally matters that I find knowing
6 and voluntary, the development of this case suggests to me that
7 this may be one of the very few exceptions that I have
8 recognized there. So, I note it, and I will inquire of the
9 defendant with respect to it.

10 Now, in addition, I have several different motions
11 here concerning what I will call themes and variations on the
12 Victim/Witness Act, and, in particular, motions to seal. I
13 have from the Government a request that sealing continue until
14 January 5th.

15 Mr. Cabell or Mr. Heymann, what's the magic of January
16 5th?

17 MR. HEYMANN: There is no magic to it, your Honor. As
18 the Court knows, Rule 7.2 requires a date be put. The purpose
19 was to give what had been identified in the indictment as
20 Company A and Company B a period of time in which to make a
21 submission to the Court, that that would be a closed-end period
22 of time, that January 5th was simply the closed end, at which
23 point the Court could determine whether or not it was
24 appropriate to continue the sealing of the matters or allow it
25 to elapse and unseal. Or, I guess, a third possibility is to

1 enter an order with respect to the motions.

2 THE COURT: I have a submission with respect to
3 Company A. With respect to Company B, do you have any
4 understanding of their position?

5 MR. HEYMANN: I do not, your Honor. I spoke to
6 Company B's attorney this afternoon. I told him at that time
7 that I did not anticipate that it would be resolved today, that
8 the motion gave him until January 5th in order to make his
9 decision and make a submission. And he said to me at the time
10 he was going to go back after our discussion of the merits on
11 both sides, speak to his client, and make a determination of
12 whether to make a filing, and if he made a filing he would do
13 it by January 5th.

14 THE COURT: Now, you have made a filing, or the
15 Government made a filing itself, in opposition, ultimately, to
16 the Motion to Seal --

17 MR. HEYMANN: Yes, your Honor.

18 THE COURT: -- with respect to these two entities. Do
19 you have any objection to Company A being permitted to
20 intervene in this matter?

21 MR. HEYMANN: No, your Honor. As indicated in our
22 response, which I know was just filed this morning, we have no
23 objection to the intervention for the purpose of airing out
24 this issue. They have asked solely for the purpose of airing
25 out this particular issue. We have no objection to it, and

1 should Company B seek to intervene for the purpose of airing it
2 out, we have no objection to its airing it out. It's the
3 relief they seek to which we have an objection.

4 THE COURT: Well, there is a kind of lag time that is
5 related here. Company A got its opposition in promptly -- or
6 its concerns expressed promptly; Company B has not yet done
7 that, and I am loath to make a distinction between the two.

8 So, I think I will simply allow Company A to intervene
9 and take up the merits of the question of disclosure of the two
10 when the time period has run, unless the Government or -- and I
11 understand there is a representative of Company A here -- wish
12 to be heard in oral argument with respect to it.

13 MR. HEYMANN: We have no objection to the Court's
14 plan. We also don't anticipate that -- you know, it's hard
15 without seeing what Company B's submission would be, but the
16 nature of our submission is such that I would expect that it
17 will be the sole submission of the Government addressing the
18 issue.

19 THE COURT: Okay. Now, there is someone here from
20 Company --

21 I am sorry, Mr. Weinberg. Did you want to add
22 something?

23 MR. WEINBERG: No. I just wanted to be clear.
24 Mr. Gonzalez has no position, understands who Companies A and B
25 are. There is no notice burdens, and the Rule 11 can proceed

1 with an intelligent plea based on his subjective knowledge of
2 Companies A and B.

3 THE COURT: All right. Now, I was told that there is
4 someone here from Company A to speak on behalf of Company A
5 here.

6 MR. RICCIUTI: Michael Ricciuti, from K&L Gates.

7 THE COURT: Mr. Ricciuti, do you have any objection to
8 my ruling on this, on the papers, once the January 5th deadline
9 has run, or do you wish to be heard?

10 MR. RICCIUTI: I would wish to be heard, your Honor,
11 but I think your plan makes sense, to hear from Company B, give
12 the Court time to review the papers. If the Court finds
13 argument helpful, we, of course, think it would be helpful, but
14 I leave it to the Court's discretion, your Honor. We think it
15 would be useful, but if the Court does not think so, we
16 wouldn't press it.

17 THE COURT: Okay. Well, I will look at the papers and
18 see whether or not it is necessary.

19 Let me ask one other question, not of you,
20 Mr. Ricciuti, but of you, Mr. Heymann.

21 The identification of the co-defendants, Hacker 1 and
22 Hacker 2; have their names been disclosed at this point
23 publicly?

24 MR. HEYMANN: I believe the defendant is fully aware
25 of who Hacker 1 and Hacker 2 are. If there's any issue of

1 that --

2 Is there any issue?

3 MR. WEINBERG: No.

4 MR. HEYMANN: There is no issue with that, your Honor.

5 THE COURT: And with respect to the use of "Hacker 1"
6 and "Hacker 2" as names there, have they been arraigned? What
7 is the story?

8 MR. HEYMANN: They remain fugitives, your Honor.

9 THE COURT: All right. Will they be identified,
10 however, by name during the course of the Rule 11?

11 MR. HEYMANN: In the course of this proceeding, no,
12 your Honor.

13 THE COURT: Okay. Just a moment. That is fine. That
14 is the court artist.

15 All right. Now, let me get to a secondary issue in
16 this case, and that has to do with the relationship to Judge
17 Saris's cases.

18 As you know, we have a very strong rule about random
19 assignment of criminal cases, and, as a consequence, this case
20 was separately assigned to me, although Judge Saris has the
21 other cases, and I know the parties sought consolidation. I
22 think it is fair to say that the circumstances are such that
23 the Court is going to have to revisit, as a general matter, the
24 Court, itself, its random assignment for matters such as this
25 being brought in from other Districts. But until that happens,

1 I have a separate responsibility here.

2 My view, however, would be this: That I would not be
3 involved in sentencing until after Judge Saris has done the
4 sentencing in the case, and while, obviously, I will give the
5 most careful deference to what Judge Saris does, I am going to
6 and must act independently in this matter, and that is
7 anticipated, I think, by the waiver document that was submitted
8 here.

9 Now, in terms of just simple timing, anticipating that
10 there is some period of time that is going to be deferred for
11 sentencing, do the parties have any objection to that --
12 deferred for Judge Saris -- any objection to my waiting until
13 Judge Saris has completed her sentencing?

14 MR. WEINBERG: No, your Honor.

15 MR. HEYMANN: No, your Honor, and I think, as a
16 practical matter, in the normal course of things it would.
17 Judge Saris's -- the sentencing in the two matters before Judge
18 Saris are scheduled for March 18th. I don't recall, as I stand
19 here, what the time is, but on March 18th. And that would be
20 inside the framework that the Court would normally permit for
21 the pretrial -- for the presentencing materials to be prepared.

22 The ancillary matter to which the Court referred to
23 earlier of the question of whether or not the Government should
24 have an opportunity for an independent psychological evaluation
25 may affect the timing of that sentencing. But there is no

1 reason that this Court's sentencing shouldn't take place after
2 Judge Saris's sentencing, and, if necessary, we could --

3 THE COURT: Do you anticipate it is going to change
4 the timing for Judge Saris's? I understand there is a March
5 18th date, you tell me. Are all of the necessary materials
6 likely to have been developed by then?

7 MR. HEYMANN: We are very, very early along in that
8 decision-making process. It, frankly, only came up in the last
9 few days -- about two weeks ago. So, we are in the process of
10 evolving what materials we will be given access to by the
11 defendant; in turn, what additional materials Judge Saris may
12 need to make a decision. She initially denied the Government's
13 right to have an independent psychological evaluation but did
14 it without prejudice to reconsidering it, when the Government
15 specified what questions it would likely be asking.

16 So, it's all very early along, and it's hard to
17 anticipate right now exactly what the answer is. But, no, I
18 would not expect it would be delayed, and if it were delayed, I
19 would not expect it to be delayed long.

20 THE COURT: Well, again, I think my view is that I
21 would be following along in the path that Judge Saris has set
22 out, at least procedurally. Substantively, I will have to make
23 my own determination about the impact of these materials, and I
24 think what I would do is simply set an instrumental date for
25 sentencing, with the understanding that it will be rescheduled

1 to accommodate the parties, and I would assume that it would be
2 done in relative proximity, if not the same day, a day later
3 there, to save the parties some time on this.

4 Is that agreeable?

5 MR. WEINBERG: Yes, your Honor. In fact, we were
6 going to request March 19, which is the day immediately
7 following the March 18 sentencing hearing before Judge Saris,
8 so that Mr. Gonzalez's family and friends, who would be coming
9 from the South Florida area, would be able to make one rather
10 than multiple trips.

11 THE COURT: Okay. Well, I will set that date; that
12 is, if Mr. Lovett will let me set that date.

13 (Court conferring with the Clerk)

14 THE COURT: Why don't we set it at 2:30 on the 18th?

15 MR. WEINBERG: Thank you, Judge.

16 MR. HEYMANN: Your Honor, on the 19th, you mean?

17 THE COURT: 19th, I am sorry. We will set it at 2:30
18 on the 19th, on the assumption that that may well be subject to
19 some change here.

20 So, let me, then, just deal briefly with the motions
21 that I think are before me. First, I allow the Motion to
22 Intervene of Company A, and I reserve on the question of the
23 relief sought as to continued protective order and sealing.

24 I allow the limited Motion to Seal by the Government,
25 which is number 6, the Motion of Company A's number 9, awaiting

1 the possibility of further submissions by Company B.

2 I also allow number 13, which is another limited
3 Motion to Seal with respect to the identity of Company A and
4 Company B.

5 And, finally, does anyone want to be heard on the
6 question of the alternative notice procedures for victims?

7 Is that, by the way, what Judge Saris has done?

8 MR. HEYMANN: Yes, your Honor. As I stand here, I
9 can't recall whether -- it was filed simultaneously in all of
10 the Courts as they have come up with various matters. In a
11 number of them it's been granted. I can't remember whether
12 it's been ruled on in all Courts, but in all courts considering
13 it, it has been granted.

14 THE COURT: Okay. Any objection from --

15 MR. WEINBERG: No, your Honor.

16 THE COURT: And, Mr. Ricciuti, I guess you are an
17 intervenor, so you can express a view.

18 MR. RICCIUTI: I have no position on it. Thank you.

19 THE COURT: All right. So, that will be allowed.
20 That is number 8.

21 So, unless there are further matters that we need to
22 take up, I will move to the question of the change of plea
23 here, and I will ask Mr. Lovett to swear Mr. Gonzalez.

24 ALBERT GONZALEZ, DULY SWORN BY THE CLERK

25 THE COURT: You may be seated, Mr. Gonzalez.

1 The purpose of this hearing is to satisfy me that what
2 appears to be your intention to plead guilty to two very
3 serious federal felonies is a knowing and voluntary act on your
4 part, and in order for me to make that kind of determination, I
5 have to ask you some questions. Some of those questions are
6 personal in nature. You will understand that I am not trying
7 to delve into your personal life, except as it makes it
8 possible for me to determine whether or not you know what you
9 are doing and what you are doing is voluntary.

10 Do you understand?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Can you tell me how old a man you are?

13 THE DEFENDANT: Twenty-eight years old.

14 THE COURT: How far did you get in school?

15 THE DEFENDANT: Some high school.

16 THE COURT: Some high school?

17 THE DEFENDANT: I apologize. Some college. Completed
18 high school.

19 THE COURT: And how much college?

20 THE DEFENDANT: A couple of months.

21 THE COURT: What kinds of college courses were you
22 taking?

23 THE DEFENDANT: The core credits. I never advanced.

24 THE COURT: Just basic college courses?

25 THE DEFENDANT: That's correct.

1 THE COURT: And what have you been doing for a living
2 for the past, say, five years?

3 THE DEFENDANT: I have been doing consulting.

4 THE COURT: In what area?

5 THE DEFENDANT: In computer security.

6 THE COURT: Have you had any difficulty understanding
7 what this case is about, what it is that the Government is
8 accusing you of?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Have you had an adequate opportunity to
11 discuss this case, the defenses, and the various initiatives
12 available to you with your attorney, Mr. Weinberg?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Are you satisfied you have received from
15 him the kind of legal advice that you need to make your own
16 decision about whether or not to plead guilty?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Now, have you ever had any problems with
19 substance abuse yourself, either drugs or alcohol?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Tell me about it.

22 THE DEFENDANT: I have abused a number of drugs since
23 the age of 16.

24 THE COURT: What drugs?

25 THE DEFENDANT: Alcohol, marijuana, cocaine, various

1 hallucinogens.

2 THE COURT: Like?

3 THE DEFENDANT: LSD, Ketamine, psychedelic mushrooms,
4 2C-I, 2C-B.

5 THE COURT: When was the last time you used drugs?

6 THE DEFENDANT: May of '08.

7 THE COURT: Is that when you were arrested?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Now, the effects of having used drugs over
10 an extended period of time, and this array of drugs, is it
11 interfering with your ability now to make your own decision
12 about whether or not to plead guilty here?

13 THE DEFENDANT: No, your Honor.

14 THE COURT: Do you think you are clear-eyed enough and
15 clear-minded enough to make that kind of determination?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Are you taking any prescription drugs?

18 THE DEFENDANT: I am.

19 THE COURT: What?

20 THE DEFENDANT: Benadryl and Zyrtec.

21 THE COURT: And are those drugs that affect your mood?

22 THE DEFENDANT: No, your Honor; they are allergy
23 medicines.

24 THE COURT: Okay. Do they in any way affect your
25 ability to make a clear-eyed judgment about pleading guilty

1 here?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Are you seeing a physician for any kind of
4 physical problems?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: Have you ever had occasion to consult with
7 a mental health professional, like a psychiatrist or a
8 psychologist, or a psychiatric social worker, or anyone like
9 that?

10 THE DEFENDANT: I have.

11 THE COURT: Can you tell me, broadly, what the
12 complaints are when you consulted with those mental health
13 professionals?

14 THE DEFENDANT: It was for difficulty coping with my
15 situation.

16 THE COURT: Well, what time period are we talking
17 about?

18 THE DEFENDANT: Last year, around August.

19 THE COURT: After you had been arrested?

20 THE DEFENDANT: Yes.

21 THE COURT: So, when I say "complaining," you were
22 presenting to the physicians or the mental health professionals
23 concerns about your condition as someone who is under
24 indictment?

25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Who were these people? Were they
2 psychiatrists, or psychologists or psychiatric social workers?

3 THE DEFENDANT: I can't be 100 percent certain what
4 they were.

5 THE COURT: Were they people that you consulted in the
6 prison system or independently?

7 THE DEFENDANT: In the prison system.

8 THE COURT: Now, having consulted with a mental health
9 professional relatively closely to the time period of coming
10 here to plead guilty, is that affecting your ability to make a
11 clear-eyed judgment? Do you think it has any affect on your
12 ability to make a clear-eyed judgment?

13 THE DEFENDANT: No, your Honor.

14 THE COURT: Are you satisfied that you know what you
15 are doing, and what you are doing is voluntary?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: You understand you do not have to plead
18 guilty at all, that, under our system of justice, a person who
19 is accused of a crime is presumed innocent unless and until
20 that person is proved guilty beyond a reasonable doubt?

21 What that means is that the Government bears the
22 entire burden of proving each essential element of the offense
23 against you. You do not have to do anything at all. You can
24 look them straight in the eye and say, "Prove it," and unless
25 and until they can do that beyond a reasonable doubt, you are

1 presumed and remain innocent, except if you plead guilty.

2 Do you understand that, by pleading guilty, you are
3 giving up those valuable constitutional rights?

4 THE DEFENDANT: Yes, I understand.

5 THE COURT: And you understand, as well, you can
6 challenge the Government's case; that is to say, you could have
7 Mr. Weinberg cross-examine the Government's witnesses, you
8 could have him bring in witnesses on your behalf? And if some
9 of those witnesses would not come in here voluntarily, I would
10 give him court process to force them to come in here. And you
11 would have the right to take the witness stand yourself and
12 tell your side of the story, or you could choose not to. And
13 if you chose not to, I would tell the jury, and, of course, if
14 it were tried to me, I would observe this principal myself,
15 that we cannot hold that against you.

16 That is another valuable constitutional right that you
17 have, the right to remain silent in the face of criminal
18 accusation.

19 Now, by pleading guilty, you are giving up all of
20 those rights. Do you understand that.

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Now, I am told that you are pleading
23 guilty pursuant to a plea agreement that was entered into with
24 the United States Attorney's Office in the District of New
25 Jersey. Is that correct?

1 THE DEFENDANT: That's correct, your Honor.

2 THE COURT: Apart from that plea agreement, did
3 anybody promise you anything to get you to plead guilty?

4 THE DEFENDANT: No, your Honor.

5 THE COURT: Did anybody threaten you in any way to get
6 you to plead guilty?

7 THE DEFENDANT: No, your Honor.

8 THE COURT: You understand -- or at least I understand
9 from this plea agreement that the parties have determined a
10 kind of range of sentences that they consider to be reasonable
11 here, and they have made some calculations about the Sentencing
12 Guidelines. But you understand I am not bound by those?

13 THE DEFENDANT: Yes, I understand, your Honor.

14 THE COURT: I can make my own determination with
15 respect to those. Do you understand that?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: And if you do not like the sentence I
18 impose, you do not get to withdraw that sentence; you are stuck
19 with it. Do you understand that?

20 THE DEFENDANT: Understood, your Honor.

21 THE COURT: Although, you do have, under certain
22 circumstances, according to this plea agreement, rights of
23 appeal. Do you understand that?

24 THE DEFENDANT: I do, your Honor.

25 THE COURT: Now, I mentioned that I was going to be

1 dealing with the question of the Sentencing Guidelines. Those
2 are a series of directives to me that tell me what the proper
3 sentence should be for someone with your background who is
4 engaged in these kinds of crimes, and they require me to
5 consider various aspects of the crime itself and various
6 aspects about your background. And I will make my own
7 determinations, just as the parties already have made their own
8 determinations, and my determinations may be different from
9 what the parties determine.

10 Do you understand that?

11 THE DEFENDANT: I understand, your Honor.

12 THE COURT: And you understand the Guidelines are
13 advisory, they are not mandatory, and I will consider the other
14 factors that are imposed by statute that affect the question of
15 what the proper sentence would be, and, ultimately, I will
16 impose what I consider to be the proper sentence.

17 Now, we had a conversation earlier about Judge Saris's
18 cases, and I indicated that I would give anything that she does
19 respectful consideration, but I am not bound by that. Do you
20 understand that?

21 THE DEFENDANT: I understand, your Honor.

22 THE COURT: Do you have any questions of me regarding
23 your plea agreement?

24 THE DEFENDANT: I do not, your Honor.

25 THE COURT: You have had an adequate opportunity, I

1 take it, to discuss it fully with Mr. Weinberg?

2 THE DEFENDANT: I have, your Honor.

3 THE COURT: Now, one aspect that I raised earlier is
4 this question of Waiver of Appeal and Collateral Attack, and,
5 as I indicated, it has been my experience that very few
6 defendants are in a position voluntarily and knowingly to waive
7 appeal, and it has been my practice not to accept such waivers,
8 except in unusual circumstances, of which this appears to be
9 one, of someone who has substantial experience and substantial
10 opportunity to discuss with his counsel what it means to give
11 up the right of appeal. Now, have you had that opportunity
12 with Mr. Weinberg?

13 THE DEFENDANT: I have, your Honor.

14 THE COURT: Okay. Now, under this Waiver of Appeal
15 and Collateral Attack -- and you understand that "collateral
16 attack" is a mechanism after the final judgment is entered,
17 after the opportunity for direct appeal has ended, to make a
18 challenge to the judgment? You understand that?

19 THE DEFENDANT: I do, your Honor.

20 THE COURT: And under this Waiver of Appeal and
21 Collateral Attack, you say that you are giving up your right to
22 challenge the sentence that's imposed by me so long as the
23 sentence does not exceed 300 months, which is 25 years. Do you
24 understand that?

25 THE DEFENDANT: That's correct.

1 THE COURT: And the Government is taking a similar
2 tact; that is to say, the United States Attorney's Office for
3 the District of New Jersey -- and this is binding on the
4 Department of Justice -- is taking the position that they give
5 up the right to appeal if the sentence of imprisonment is at
6 least 204 months or 17 years in prison.

7 Do you understand that that is the range that the
8 parties have entered into here?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: All right.

11 MR. WEINBERG: If your Honor please, I don't know if
12 the amendment to the appeal waiver reached your Honor, but the
13 waiver is to a cumulative 300 months.

14 THE COURT: Yes, and I should have developed that more
15 fully.

16 This is based on the assumption that, together, the
17 sentences that Judge Saris and I impose do not either exceed
18 300 months or are not less than 204 months.

19 Do you understand that?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: So, one of the things that I suspect I
22 will be asked to do is to impose what is called a concurrent
23 sentence, concurrent, at least in part, to the sentence that is
24 imposed by Judge Saris. Do you understand that?

25 THE DEFENDANT: I do, your Honor.

1 THE COURT: Okay. Now, with respect to this waiver of
2 the right to appeal, the parties, both of the parties, have
3 reserved their right to appeal determinations of things like
4 the Criminal History Category that I determine here. And if,
5 as we anticipate, my sentencing is after Judge Saris's, I will
6 be imposing a sentence in which you have a criminal history
7 created by your sentences by Judge Saris.

8 Do you understand that?

9 THE DEFENDANT: I do.

10 THE COURT: Now, are there any other aspects of the
11 plea agreement that the parties want me to inquire of
12 specifically?

13 MR. HEYMANN: No, your Honor.

14 THE COURT: Now, the crime that you are pleading
15 guilty to here, or crimes, I should say, that you are pleading
16 guilty to here, Mr. Gonzalez, are two: One is a conspiracy,
17 and it is a conspiracy to violate three separate laws, any one
18 of which would support the conspiracy. It is an agreement
19 between you and at least one other person to enter into an
20 agreement to commit offenses against the United States.

21 And, more specifically, the charging language says
22 that this was an agreement to use by means of interstate
23 communications knowingly and intentionally to access computers
24 in interstate commerce without authorization and obtain
25 information from those computers, namely credit and debit card

1 numbers and corresponding card data for the purpose of some
2 sort of commercial advantage or private financial gain, and
3 that is, if that conspiracy is entered into, a violation of the
4 Federal criminal law.

5 There is a second potential objective of the
6 conspiracy, and that is to knowingly and with intent to defraud
7 access computers in interstate commerce and exceed authorized
8 access to such computers, and by such means of conduct to
9 further fraud and obtain things of value, namely credit card
10 and debit card numbers and corresponding card data. That is
11 also in violation of federal law.

12 And the final object of the conspiracy, broadly
13 stated, is knowingly to cause the transmission of programs,
14 information, codes and commands, and, as a result of that,
15 intentionally cause damage without authorization to computers
16 that are in interstate commerce, another violation of federal
17 law.

18 You understand that those are the three branches of
19 the conspiracy that the Government has charged you with?

20 THE DEFENDANT: Yes.

21 THE COURT: Now, have you discussed fully with
22 Mr. Weinberg what the elements of this offense are, what it is
23 that the Government has to prove?

24 THE DEFENDANT: I have, your Honor.

25 THE COURT: Do you have any questions of me of what

1 the Government has to prove?

2 THE DEFENDANT: Not at this time.

3 THE COURT: All right. Now, the second charge is a
4 conspiracy to engage in what is called "Wire Fraud," and that
5 is Count 2 of the indictment.

6 And, here, what is alleged is that you entered into an
7 agreement with one or more other persons to knowingly and
8 intentionally devise a scheme and artifice to defraud certain
9 corporate victims who are identified in this indictment and
10 certain financial institutions that issued credit and debit
11 cards to those customers, and the purpose of that scheme was to
12 obtain money and property by means of materially false
13 misrepresentations or fraudulent misrepresentations or
14 promises, and that, for purposes of executing that scheme, you
15 would make use of the means of wire communication in interstate
16 and foreign commerce.

17 Do you understand that that is what the Government is
18 charging you with in Count 2?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: And, again, have you discussed fully with
21 Mr. Weinberg what the defenses are to that and what kind of
22 initiatives you could pursue to defend against these charges?

23 THE DEFENDANT: I have, your Honor.

24 THE COURT: And have you discussed with him the
25 elements of the offenses --

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: -- of this offense? Is there anything
3 that you have to ask me about that offense?

4 THE DEFENDANT: I do not.

5 THE COURT: All right. Now, you earlier said, "Not at
6 this time." This is the time to ask. Do you understand that,
7 Mr. Gonzalez?

8 THE DEFENDANT: I do.

9 THE COURT: All right. Now, I would like to know,
10 either Mr. Heymann or Mr. Cabell, what the maximum penalties
11 could be with respect to these counts.

12 MR. HEYMANN: Your Honor, with respect to Count 1, the
13 18 U.S.C. Section 371 conspiracy, the maximum penalty is five
14 years' incarceration, along with the greatest of a \$250,000
15 fine, twice the gross amount of his pecuniary gain, or twice
16 the gross amount of the pecuniary loss sustained by the
17 victims.

18 THE COURT: At this point, does the Government have a
19 sense of what that gain or loss would be?

20 MR. HEYMANN: The loss would be -- the loss -- there
21 is a stipulated number in here at a minimum of \$20 million, and
22 we would expect that loss to be higher than that. So, it would
23 be twice -- a minimum of \$20 million is the loss.

24 While the plea agreement itself doesn't set this
25 forth, there would be also with respect to Count 1 a period of

1 supervised release of three years.

2 With respect to Count 2, the 18 U.S.C. Section 1349
3 wire fraud conspiracy charge, there would be a maximum prison
4 sentence of 30 years. I know it is generally 20 years in
5 proceedings before the Court, but it's triggered by the victim
6 being a financial institution. So, it's a maximum of 30 years'
7 imprisonment and, again, the greatest, in terms of fine, of in
8 this case \$1,000,000, twice the gross amount of any pecuniary
9 gain that any person derived from the offense or twice the
10 gross amount of any pecuniary loss sustained by any victims of
11 the offense.

12 Here, the maximum period of supervised release would
13 be five years because of the length of the sentence. There is
14 also in this case -- notice has been given under 18 U.S.C.
15 Section 3147, which pertains to the offense having been
16 committed while he was on pretrial release.

17 As a result of that, there is a mandatory consecutive
18 sentence to be imposed, but there is no minimum to what that
19 mandatory sentence is. It has a maximum of 10 years'
20 imprisonment, but there is no minimum associated. It simply
21 has to be consecutive to the other sentences.

22 THE COURT: All right. Now, with respect to Judge
23 Saris's case, then, assuming that, as you must, I will be
24 sentencing after Judge Saris here, I must impose a consecutive
25 sentence of some duration to whatever sentence she imposes.

1 MR. HEYMANN: Your Honor, I am not clear on that at
2 all.

3 The 18 U.S.C. Section 3147 notice was not given in
4 Judge Saris's case, so there is no -- in that regard, the plea
5 agreements aren't in sync or aren't parallel. And this, as I
6 understand it, is a mandate that it be consecutive to the
7 charges in the indictment itself, not consecutive to all
8 earlier sentences imposed in an earlier proceeding.

9 THE COURT: So, it stands alone within this
10 indictment?

11 MR. HEYMANN: Yes, your Honor.

12 THE COURT: All right.

13 Mr. Weinberg.

14 MR. WEINBERG: And we would contend, your Honor, that
15 although a sentence under that statute needs to be on and
16 after, that the aggregate of the sentence for the underlying
17 offense, in combination with any sentence your Honor in your
18 discretion imposed under 3147, could be a sentence that would
19 not exceed 17 years, and, therefore, if Judge Saris's sentence
20 was 17 years, the sentence would be fully concurrent.

21 THE COURT: I see. All right.

22 Well, do you understand what the range of sentences
23 could be in terms of maximums here, Mr. Gonzalez? Do you
24 understand that that is what you are pleading to?

25 THE DEFENDANT: I do.

1 THE COURT: So, you face a considerable amount of time
2 in jail as a result of your plea in this case. Do you
3 understand that?

4 THE DEFENDANT: I do, your Honor.

5 THE COURT: And it is going to affect other aspects of
6 your life. It may mean that you cannot vote, you cannot serve
7 on a jury, you cannot hold a public office. It may affect your
8 ability to get jobs afterwards. All aspects of your life are
9 going to be affected by your plea of guilty in this case.

10 Do you understand that?

11 THE DEFENDANT: I do, your Honor.

12 THE COURT: Are you still prepared to plead guilty?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Now, one of the things I have to do is
15 satisfy myself that there is sufficient evidence from which a
16 finder of fact could find you guilty of the offenses charged.
17 So, I am going to ask the Government to tell me, briefly, what
18 the evidence would be in this case if it went to trial.

19 I want you to listen very carefully, because, when
20 they are through, I am going to turn to you and say, "Is that
21 what happened?"

22 All right. Mr. Heymann.

23 MR. HEYMANN: Your Honor, with respect to this plea
24 agreement, there is a set of facts which I will now read for
25 the purpose of the record and for the purpose of this

1 proceeding that the parties have agreed to stipulate to
2 supporting the charges in this case.

3 THE COURT: All right.

4 MR. HEYMANN: Between at least as early as October
5 2006 and May 2008, Defendant Gonzalez and the individual
6 identified in the indictment as "PT" --

7 THE COURT: Because you are reading, Mr. Heymann, you
8 might want to slow down a little bit.

9 MR. HEYMANN: Okay. I apologize.

10 THE COURT: We all tend to read more quickly, I think.

11 MR. HEYMANN: To start again: Between at least as
12 early as October 2006 and May 2008, Defendant Gonzalez and the
13 individual identified in the indictment as "PT," hereinafter
14 "PT," identified potential corporate victims by reviewing lists
15 of Fortune 500 companies.

16 During that time, Defendant Gonzalez and PT traveled
17 or had others travel on their behalf to retail stores to
18 explore the types of point-of-sale systems used in those stores
19 and to understand their potential vulnerabilities. Defendant
20 Gonzalez leased or otherwise controlled the Ukrainian server,
21 the Latvian server and the ESTHost server defined in the
22 indictment.

23 Defendant Gonzalez gave PT access to certain hacking
24 platforms and instructed PT to encrypt the hacking platforms
25 and disabled logging functions on them in order to prevent the

1 hacking activities that would take place on those servers from
2 being discovered. Defendant Gonzalez gave access to the
3 hacking platforms that he controlled to Hacker 1 and Hacker 2,
4 identified in the indictment, among others, knowing that Hacker
5 1 and Hacker 2 would use those servers to store malware and
6 launch attacks against corporate victims.

7 Defendant Gonzalez controlled the "S" Directory of the
8 Ukrainian server. Malware used against Heartland, Company A
9 and Company B matched malware found in the "S" Directory of the
10 Ukrainian server. Defendant Gonzalez instructed PT to modify
11 malware used in the attacks on Heartland and Company A to
12 connect to IP addresses that Gonzalez provided him.

13 Defendant Gonzalez and PT tested software by running
14 multiple antivirus programs in an attempt to ascertain if the
15 program detected the malware.

16 Defendant Gonzalez knew that Hacker 1 and Hacker 2
17 gained unauthorized access to Hannaford Brothers through a
18 related company's servers. Defendant Gonzalez engaged in
19 instant messaging with Hacker 1 and Hacker 2 before, during and
20 after hacks into corporate victims, including a discussion in
21 which one of the co-conspirators stated, quote, Planning my
22 second phase against Hannaford, closed quote, and another in
23 which one of the co-conspirators stated, quote, "core still
24 hasn't downloaded that" -- there is a substitution in brackets
25 here -- [Company B] sh-t, period, closed quote.

1 On or about November 6, 2007, Defendant Gonzalez
2 transferred a computer file to the Ukrainian server named
3 sqlz.txt that contained information taken without authorization
4 from Company A's computer network. Defendant Gonzalez was
5 aware that Hacker 1 and Hacker 2 were attempting to access
6 Heartland payment systems between in or about December 2000 and
7 in or about January 2008.

8 Between in or about August 2007 and in or about
9 November 2007, Hacker 1 and Hacker 2, with Gonzalez's
10 knowledge, gained unauthorized access to 7-Eleven, Inc's
11 servers through 7-Eleven's public-facing internet site, and
12 then leveraged that access into servers supporting ATM
13 terminals located in 7-Eleven stores. This access caused
14 7-Eleven, Inc. on or about November 9, 2007 to disable its
15 public-facing internet site to disrupt the unauthorized access.

16 In or about January 2008, Defendant Gonzalez sent PT
17 the SQL injection string that PT used to gain unauthorized
18 access to Company B's servers. On or about April 22, 2008,
19 Defendant Gonzalez modified a file on the Ukrainian server that
20 contained computer log data stolen from Company B's computer
21 network.

22 It was foreseeable to Defendant Gonzalez that Hacker 1
23 and Hacker 2 would use malware together and steal credit and
24 debit card numbers and associated credit card data from the
25 corporate victims identified in the indictment, including tens

1 of millions of credit and debit card numbers.

2 It was foreseeable to Defendant Gonzalez that the
3 theft of credit and debit card numbers and associated card data
4 in the possession of the corporate victims identified in the
5 indictment would affect more than 250 financial institutions.

6 It was foreseeable to Defendant Gonzalez that the
7 losses resulting from unauthorized access into the servers of
8 the corporate victims identified in the indictment would exceed
9 \$20 million.

10 Defendant Gonzalez conspired to gain unauthorized
11 access to corporate victims identified in the indictment while
12 on pretrial release from the District of New Jersey.

13 THE COURT: All right.

14 Now, what Mr. Heymann was reading from was called
15 Schedule A to your Plea Agreement. You have read that before;
16 is that right?

17 THE DEFENDANT: Yes, I have.

18 THE COURT: And you heard what Mr. Heymann read here
19 today. Do you dispute any of that?

20 THE DEFENDANT: I do not.

21 THE COURT: Is that what happened?

22 THE DEFENDANT: That's true.

23 THE COURT: Okay. Mr. Heymann, do you know of any
24 reason I should not accept a plea?

25 MR. HEYMAN: No, I do not, your Honor.

1 THE COURT: Mr. Weinberg?

2 MR. WEINBERG: No, your Honor.

3 THE COURT: All right. I am going to ask Mr. Lovett
4 to inquire of Mr. Gonzalez.

5 THE CLERK: Mr. Gonzalez, would you please rise.

6 (Defendant stands)

7 THE CLERK: On Criminal No. 09-10382, Count 1 of the
8 indictment charges you with Conspiracy to Defraud the United
9 States, in violation of Title 18, United States Code 371.

10 Count 2 of the indictment charges you with Conspiracy
11 to Commit Wire Fraud, in violation of Title 18, United States
12 Code 1349.

13 You have previously pled not guilty. Do you now wish
14 to change your plea?

15 THE DEFENDANT: I do.

16 THE CLERK: What say you as to Count 1, guilty or not
17 guilty?

18 THE DEFENDANT: Guilty.

19 THE CLERK: What say you as to Count 2, guilty or not
20 guilty?

21 THE DEFENDANT: Guilty.

22 THE COURT: You may be seated.

23 I believe I am obligated, under the Victim Act, to
24 inquire whether or not any victim wishes to be heard before I
25 make a determination here.

1 Is there any victim who wishes to be heard before I
2 make a determination whether to accept the plea?

3 (No response)

4 THE COURT: And seeing no response to that, I will
5 accept the plea.

6 I find it to be knowing and voluntary on your part,
7 Mr. Gonzalez, and it is supported by substantial evidence from
8 which a finder of fact could find you guilty of the offenses
9 charged. You are now adjudged guilty of those offenses.

10 What is going to happen now, as you probably know from
11 the proceedings before Judge Saris, is that the Probation
12 Office of the Court will prepare a Presentence Report. It is a
13 matter that I rely on very heavily in making my own
14 determination. Both you and Mr. Weinberg will have a chance to
15 work with the Probation Office, bring to their attention things
16 that you think they should know and also answer questions about
17 things that they think I should know.

18 You will get a chance to see the Presentence Report in
19 its draft form. You can ask the Probation Office to make
20 changes or corrections. If they do not make the changes or
21 corrections to your satisfaction, you can bring the matter up
22 to me at the time of sentencing. And at the time of
23 sentencing, both you and Mr. Weinberg will have an opportunity
24 to address me orally in open court about the factors that I
25 should have in mind before I do impose a sentence in this case.

1 We have set, preliminarily, the sentencing for March
2 19th, with the understanding that that date may change in
3 relation to the development of additional materials having to
4 do with the question of sentencing.

5 Do you have any questions of me, Mr. Gonzalez?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: Is there anything else that we need to
8 take up at this point?

9 MR. HEYMANN: No, your Honor.

10 THE COURT: All right.

11 MR. WEINBERG: No, your Honor.

12 THE COURT: Then, we will be in recess. Thank you.

13 THE CLERK: All rise.

14 (The Honorable Court exited the courtroom at 2:50 p.m.)

15 (WHEREUPON, the proceedings adjourned at 2:50 p.m.).

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of United States v. Albert Gonzalez, No. 1:09-cr-10382-DPW-1.

Date: March 23, 2010

/s/ Brenda K. Hancock

Brenda K. Hancock, RMR, CRR

Official Court Reporter